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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

ETIOPIA EVANS, et al,	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	NO. C 16-1030 WHA
	)	
ARIZONA CARDINALS FOOTBALL CLUB,	)	
LLC., et al,	)	
	)	San Francisco, California
Defendants.	)	Thursday
	)	June 9, 2016
	)	8:00 a.m.

**TRANSCRIPT OF PROCEEDINGS**

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P R O C E E D I N G S

**JUNE 9, 2016**

**8:07 A.M.**

**THE COURT:** We go to Etopia Evans versus Arizona Cardinals Football Team.

**THE CLERK:** Civil 16-1030. Matter is on for a motion hearing.

Counsel, can you please state your appearances for the record?

**MR. LEVY:** Good morning, your Honor. Gregg Levy of Covington and Burling for the Arizona Cardinals and the other NFL clubs.

**THE COURT:** Okay.

**MR. CLOSIUS:** Good morning, your Honor. Phil Closius for Etopia Evans and 12 other plaintiffs.

**THE COURT:** All right. So where does the original case that I had a year ago where, is that case now? Is that still on?

**MR. LEVY:** Yes, your Honor.

**MR. CLOSIUS:** *Dent versus the NFL*, your Honor. Briefs have been filed and we're waiting for an oral argument date in front of the Ninth Circuit.

**THE COURT:** So I sent out this -- I'm not going to rule on the -- I don't want to go through that argument again except for these four issues. And at the end of it, I'm probably going to get you to file supplemental briefs, but I

1 thought we would talk about it orally for a minute to help me  
2 understand the differences between this case and the other  
3 case.

4 So who wants to go first? The plaintiff. Go why doesn't  
5 the plaintiff go first?

6 **MR. CLOSIUS:** Sure. Do you want me to take it in the  
7 order in which you have the questions, your Honor?

8 **THE COURT:** Yeah. It would be useful to just go down  
9 the list of the questions.

10 **MR. CLOSIUS:** Your first question is whether the  
11 Ninth Circuit or Fourth Circuit law applies to the preemption  
12 issue.

13 Our position, as we look at this, is that the Supreme  
14 Court has said in diversity cases the law of the transferor  
15 court should apply, but the Ninth Circuit has held that when it  
16 comes to federal issues, that is not the case and with federal  
17 issues Ninth Circuit law should apply.

18 Preemption issues -- some of the other circuits are split  
19 on that, your Honor, but preemption, I believe, is properly  
20 seen as a federal issue and we will then say the Ninth Circuit  
21 law should apply here.

22 **THE COURT:** So let's get your view on that.

23 **MR. LEVY:** Your Honor, we agree. Ninth Circuit law  
24 should apply.

25 For reference the controlling case in the Ninth Circuit is

1 *Newton v Thomason*, 22 F.3d 1455-1460.

2           **THE COURT:** Make sure my law clerk is writing that  
3 down. Say that again.

4           **MR. LEVY:** I will. *Newton v Thomason*, 22 F.3d 1455,  
5 and at Page 1460 the Ninth Circuit said:

6           "We, therefore, hold that when reviewing federal  
7 claims a transferee in this circuit is bound only by  
8 our circuit's precedents."

9           **MR. CLOSIUS:** Your Honor.

10          **THE COURT:** Yes, sir.

11          **MR. CLOSIUS:** If I might add. In the Ninth Circuit  
12 because of this rule, as you mentioned, supplemental briefs are  
13 frequently allowed.

14          We think that many of these issues don't need supplemental  
15 briefing, but if I might, I do think there is one critical  
16 issue that needs to have a supplemental brief because it was  
17 not briefed in the *Dent* case. It has not been briefed by the  
18 defense reply in *Evans*. And it was not briefed by us because  
19 in the Fourth Circuit this ruling is fairly clear.

20          In the *Dent* opinion the Court dealt with the issue of  
21 illegality, which the United States Supreme Court and every  
22 circuit has a case saying that will illegal conduct can not be  
23 the basis for preemption.

24          In *Dent* that opinion dismissed that claim by essentially  
25 indicating it only applies when the complaint is based on a

1 private right of action from the statute. There was not much  
2 support for that opinion in *Dent*. The support was citing  
3 *Kramer*.

4 As we read *Kramer*, *Kramer* does not support that assertion.  
5 *Kramer* was an invasion of privacy claim based on the California  
6 Constitution and a claim for intentional infliction of  
7 emotional distress. The statute which made the wiretapping  
8 illegal in *Kramer* was statute 653(n), which specifically does  
9 not grant a private cause of action to anyone, except the  
10 prosecutors.

11 In *Kramer*, the Court used that illegal statute to then  
12 modify the definition of "reasonable" in the privacy case and  
13 the definition of "outrageous" in the intentional infliction of  
14 emotional distress claim, which is exactly what we're doing in  
15 *Evans*.

16 If the Court is going to consider applying that part of  
17 the *Dent* opinion to *Evans*, we would at least like the  
18 opportunity to brief that. Because based on our readings --  
19 and I guess counsel can make me look bad here. We find no  
20 circuit in which that rule has been applied.

21 The Fourth Circuit, in fact, was quite specific that in  
22 the case of *Owens versus Carpenters District Council* that the  
23 policy against preemption for illegal conduct applied even when  
24 no statutory remedy was in place. The District Court in  
25 Maryland in a decision filed two months after we filed the *Dent*

1 complaint --

2           **THE COURT:** What do you mean? What --

3           **MR. CLOSIUS:** Said the same thing.

4           **THE COURT:** What would be the illegal conduct here?

5           **MR. CLOSIUS:** The illegal conduct here is the  
6 violation of the Controlled Substance Act and the Food, Drug  
7 and Cosmetic Act and appropriate state statutes which mirror  
8 those statutory requirements. That's the failure to tell what  
9 the medicine is. The failure to do side effects.

10           There's seven or eight different illegal activities that  
11 come from those statutes. That is clearly referenced in the  
12 *Evans* complaint, your Honor. And for purposes of 12(b)(6)  
13 motion those should all be considered as valid.

14           **THE COURT:** All right. I'll give you a moment to  
15 respond to that.

16           **MR. LEVY:** Your Honor, this is all beside the point.  
17 And on that point, I'd invite the Court's attention to the  
18 first sentence on the first page of the introduction of  
19 plaintiff's opposition paper. There they said -- they plead  
20 claims, and I quote:

21           "For intentional misrepresentation and civil  
22 conspiracy only."

23           They are not asserting statutory claims here. They are  
24 asserting state common law claims. And that's what the  
25 doctrine of preemption was intended to address. That should be

1 the end of the matter.

2 Your Honor recognized in *Dent*, in addition, that there is  
3 no private right of action under the statutes that the  
4 plaintiffs are citing. But they are not bringing a cause of  
5 action based on those statutes. They are not bringing a  
6 federal claim. They are bringing state law claims for  
7 intentional misrepresentation and civil conspiracy only.

8 **THE COURT:** Okay. Hold those thoughts.

9 Question number two: Whether other choice of law issues  
10 exist in light of the transfer. So...

11 **MR. CLOSIUS:** Your Honor, the only argument we have  
12 for that is that, again, under the *Forenz* and *Van Dusen*, United  
13 States Supreme Court cases, when it comes to the statute of  
14 limitations argument that should be decided under Maryland law.

15 In both *Forenz* and *Van Dusen* the Court says that when  
16 defendant makes a motion under 1404(a) to transfer, the state  
17 law should control on diversity jurisdiction.

18 **THE COURT:** Well, all of your underlying claims are  
19 state law, aren't they?

20 **MR. CLOSIUS:** Correct.

21 **THE COURT:** Okay. So you'd have to apply state  
22 statute of limitations, I would assume. You would agree with  
23 that, wouldn't you?

24 **MR. LEVY:** We agree that Maryland law applies. And I  
25 think the analysis has several steps.



1 First, the transferor forums choice of law rules dictate  
2 the outcome. So here you look to Maryland choice of law rules.

3 Under Maryland choice of law rules statute of limitations  
4 are deemed procedural, not substantive. So under traditional  
5 choice of law principles, the Maryland statute of limitations  
6 law would apply, even though in terms of the merits of the  
7 claims there have to be a reference to other -- there could be  
8 a reference to other state's law.

9 But we agree on the bottom line, I think here, which is  
10 the Maryland statute of limitations law governs.

11 **THE COURT:** Do you agree with that?

12 **MR. CLOSIUS:** I was going to say, I hope you're  
13 agreeing with me.

14 **MR. LEVY:** Yes. Yes, I am.

15 **MR. CLOSIUS:** Maryland law should apply to any state  
16 law claims, and that would include the statute of limitations.

17 **THE COURT:** You're not saying any state law claims.  
18 You're saying the statute of limitations.

19 **MR. LEVY:** We're saying the statute of limitations.

20 To be honest, your Honor, I haven't thought through  
21 whether -- which state's law applies on the merits. I've only  
22 looked at the statute of limitations because that's the --  
23 that's the issue before your court in terms of these motions.

24 **MR. CLOSIUS:** We were more conflicted on the first  
25 question because of what you're posing, your Honor.

1 The preemption issue, which we agree is federal and Ninth  
2 Circuit applies, does also incorporate state tort law when you  
3 start talking about duties and reliance.

4 So even the first question we thought was slightly  
5 conflicted because there still going to be some Maryland tort  
6 law even in the Ninth Circuit's application of the preemption  
7 doctrine.

8 **THE COURT:** Are all -- how many plaintiffs are there?

9 **MR. CLOSIUS:** There are 13 total named plaintiffs.

10 How many have signed up for the class so far or how many  
11 named plaintiffs, your Honor?

12 **THE COURT:** Of the 13, how many live in Maryland?

13 **MR. CLOSIUS:** Right now, none.

14 **THE COURT:** So we apply Maryland law because of the  
15 forum location, is that it?

16 **MR. CLOSIUS:** Correct.

17 **THE COURT:** That's your view?

18 **MR. LEVY:** Yes, your Honor. But it begins by  
19 applying Maryland choice of law principles. And that's what  
20 leads to the selection of Maryland law for statute of  
21 limitations purposes.

22 **MR. CLOSIUS:** Your Honor, it's also the Supreme Court  
23 in *Van Dusen versus Barrack* that says:

24 "When defendant motions to transfer under  
25 1404(a), the transferee court shall apply the law of

1 the transferor court."

2 That would encompass their choice of law rules. I  
3 understand that. But the point comes from *Van Dusen versus*  
4 *Barrack*.

5 **THE COURT:** Number three, whether there had been any  
6 significant developments in case law regarding preemption under  
7 Section 301 since the *Dent* case. So that's been almost a year  
8 and a half ago.

9 So what do you say as to that?

10 **MR. CLOSIUS:** Your Honor, we don't have any other  
11 case but one, and that is *In Re National Hockey League Players*  
12 *Concussion Litigation*. It's a slip opinion that was decided a  
13 little less than a month ago by Judge Nelson up in the Eighth  
14 Circuit and it involves a resolution of preemption claims for a  
15 class action brought by National Hockey League players  
16 regarding concussion damages. Judge Nelson ruled in favor of  
17 the plaintiffs that those claims were not preempted.

18 Would you like me to elaborate more on the opinion?

19 **THE COURT:** I may get you to submit the slip opinion  
20 for me.

21 Okay. What does the defendant say?

22 **MR. LEVY:** Well, I would agree, that there are no  
23 significant decisions since the *Dent* opinion that bear on the  
24 issues here.

25 With regard to the concussion cases, I'd invite your

1 Honor's attention to Footnote 9, which appears on Pages 38 and  
2 39 of the opinion. It's about a -- it's a long two paragraph  
3 footnote that distinguishes this case and explains why  
4 preemption was not appropriate in that case while it was  
5 appropriate here.

6 And so I think that's the place that your Honor should  
7 start when you look at the concussion case. That footnote --

8 **THE COURT:** What's the essence of the reasoning?

9 **MR. LEVY:** The essence of the reasoning, I can  
10 summarize it, your Honor.

11 In Judge Nelson's words:

12 "Contrary to *Dent*, this case" -- the hockey case  
13 -- "involves an alleged duty that runs straight from  
14 defendant to the players without involvement of club  
15 team personnel for which defendant has articulated no  
16 directly relevant CBA counterpart that is necessarily  
17 consistent among potentially applicable CBAs that  
18 necessarily applies to any specific plaintiff."

19 In other words, there was no counterpart to the provisions  
20 that your Honor discussed at length in the *Dent* opinion that  
21 required interpretation.

22 There was no counterpart to those cited in the hockey  
23 case.

24 **MR. CLOSIUS:** Your Honor, if I might?

25 **THE COURT:** Please. Do you have a clean copy of that

1 opinion?

2 MR. CLOSIUS: I have a copy.

3 THE COURT: Is it clean so that I can -- you can give  
4 it to me?

5 MR. CLOSIUS: I'm not too sure.

6 THE COURT: I don't want to get your secret messages  
7 to yourself.

8 MR. CLOSIUS: I have a couple yellow lines. Does  
9 that matter?

10 THE COURT: Let's see how bad it is. Sometimes they  
11 say things like: Oh, no.

12 (Laughter.)

13 THE COURT: I don't even see the yellow part.

14 MR. CLOSIUS: There is no notes to you, your Honor.

15 THE COURT: I see. All right. Well, there is a  
16 couple of highlighted things. Is that all right?

17 MR. LEVY: Of course, your Honor.

18 THE COURT: All right.

19 MR. CLOSIUS: The distinction made in the footnote  
20 for the *Dent* case, Judge Nelson accepted the *Dent* opinion  
21 characterization of the *Dent* complaint, which was that the  
22 allegation was that the NFL, the league, only had a supervisory  
23 duty to the teams and not to the players. That's the premise  
24 of her distinction of *Dent*.

25 In *Evans*, in this case, that is inapplicable because we're

1 suing the teams. There is no intermediate step between the  
2 defendants and the plaintiffs that the *Dent* opinion saw in the  
3 NFL case. And that's what you're talking about.

4 **THE COURT:** Your case is against -- this case is  
5 against the clubs. The new case is against the clubs, but the  
6 old case was against the NFL?

7 **MR. CLOSIUS:** Correct.

8 **THE COURT:** All right. So I should have asked that  
9 question then. How does that affect the analysis?

10 **MR. CLOSIUS:** Well, in *Dent* the opinion, in our  
11 perspective, mischaracterizes the complaint because they  
12 didn't understand the allegations that the NFL had violated  
13 duties to the players.

14 The opinion characterized a duty as the league's  
15 supervisory duty over the teams, and that's what judge Nelson  
16 accepted in a footnote that my esteemed opponent referred to.

17 And she said:

18 "We distinguish this because in the NHL case the  
19 allegations were the league to the players; that the  
20 league violate duty owed to the players."

21 In *Dent* the opinion said:

22 "The allegations were the league had a  
23 supervisory duty to the teams, which then go to the  
24 players."

25 The buffer in between was not present in the NHL case.

1 And similarly here, your Honor, there is no buffer in between.  
2 There is defendants and there are the players.

3 They clearly owe the duty to us. And, again, we'll  
4 probably get into that in a second, but that's the distinction  
5 from Judge Nelson.

6 **THE COURT:** All right. Last question here is how the  
7 facts and claims of the instant case are different from those  
8 in *Dent*, which ties into what we were just saying.

9 So how -- how is this case different from the *Dent* case?

10 **MR. CLOSIUS:** I have about five things that matter to  
11 me, your Honor. So --

12 **THE COURT:** Please go ahead. I'm going to get you to  
13 submit this in writing later, but it helps me to hear it  
14 verbally, so go ahead.

15 **MR. CLOSIUS:** Okay. First, I start where all  
16 preemption is supposed to start, which is with the complaint.  
17 The allegations in *Evans*, this case, are fairly  
18 straightforward. Intentional misrepresentation and civil  
19 conspiracy.

20 In *Dent* there was a combination of negligence, negligence  
21 per se, fraud, medical monitoring, a whole laundry list of  
22 things.

23 Your Honor, this case is not *Dent*. It is not a negligence  
24 case. And it is certainly not a medical malpractice case. We  
25 altered the claims here because we wanted to be as clear as we

1 could be that this is alleging intentional illegal conduct.  
2 This is a conspiracy by the teams to violate the law for the  
3 purposes of profit.

4 If you understand that, the duties flow from that and  
5 acknowledge common law duty that you have to run your business  
6 in a legal manner. And even if you don't like the illegality  
7 and acknowledge common law duty, that you have to run your  
8 business truthfully. You cannot run your business on the basis  
9 of misrepresentations.

10 **THE COURT:** So what was the -- put it in -- go down  
11 to one more level of detail in terms of what you allege. What  
12 did the teams do wrong here?

13 **MR. CLOSIUS:** Your Honor, the teams have been  
14 distributing for 50 years, all 32 teams, controlled substances  
15 and prescription medicine in various ways that violate state  
16 and federal law. They hand them out without prescriptions.  
17 They don't tell anybody what the side effects are. If players  
18 ask what the side effects are, they lie to them. They omit to  
19 tell them that cocktailing and mixing of these drugs is  
20 dangerous. All for the purpose of getting them back on the  
21 field so they can play, so the NFL clubs can profit.

22 That's the guts of what we're saying. The intentional  
23 misrepresentations are both omissions and affirmative  
24 statements. They are also civil conspiracy, because they are  
25 bound together to commit illegal activity to profit themselves.



1 It's a fairly straightforward case, your Honor.

2           **THE COURT:** Take Mr. Evans as an example. What  
3 specifically is alleged that happened with him? What were the  
4 conversations and the incidences that you -- I haven't read it  
5 yet that. You call out the --

6           **MR. CLOSIUS:** Mr. Evans, unfortunately, died while he  
7 was in prison. While he was a player for both the Vikings and  
8 the Ravens, he remembers getting all kinds of pain killers, but  
9 knows a lot of them he never even got the names of.

10           His wife has testified that, you know, he was -- he would  
11 come home and say he was just handed these things. He was in  
12 constant pain. After he retired, he ended up having heart  
13 problems --

14           **THE COURT:** Let's take somebody who is still alive  
15 and could testify firsthand --

16           **MR. CLOSIUS:** We'll take Darryl Ashmore, your Honor.  
17 Is that fine?

18           **THE COURT:** Who?

19           **MR. CLOSIUS:** Darryl Ashmore.

20           **THE COURT:** Take somebody who is going to be able to  
21 be deposed. What's he going to say, according to the  
22 complaint, happened?

23           **MR. CLOSIUS:** We'll that Jerry Wunsch. He's a little  
24 easier.

25           Wunsch was an offensive lineman. Played for a number of

1 NFL teams for approximately 10 years. Again, we detail all of  
2 his travails in the NFL. He currently has a liver problem. He  
3 currently has a kidney problem. He has been divorced. He is  
4 in pain constantly. His ankles, knees and shoulders don't  
5 work. And they all come from taking Toradol and various other  
6 drugs that he was given while he was an NFL player.

7 He was not told the side effects. Many times he doesn't  
8 know all the drugs he took. He only knows some of them.

9 This is a culture where the trainers just hand you pills.  
10 How many you want? What do you need? Here, take 40 and then  
11 come back when you're done.

12 There is no talk about dosage. There is no talk about --

13 **THE COURT:** I thought the doctors handed out the  
14 pills.

15 **MR. CLOSIUS:** The trainers usually hand out the  
16 pills, your Honor. The doctors are there once a week during  
17 the week; and then they show up on game weekends for away  
18 games, on game days for home games.

19 **THE COURT:** Is that the way it works? The doctors  
20 are not even there and the trainers hand out the pills?

21 **MR. LEVY:** No, your Honor. That's not my -- that's  
22 not my understanding at all.

23 **MR. CLOSIUS:** That's not of much interest to me, your  
24 Honor, on a 12(b)(6) motion. That is clearly what we alleged  
25 in the document and that is clearly what 13 players will

1 testify to, and I believe 500 others from the class will  
2 testify to that also. Doctors are not there every day.

3 **THE COURT:** All right. So let's go to the defendants  
4 now. The other case was against the NFL and this is against  
5 different defendants. So how do you -- why is *Dent* even  
6 relevant then?

7 **MR. LEVY:** Well, I'll make two points, your Honor.  
8 I'll answer that question first and then I'd like to respond to  
9 the point that has just been made.

10 In the *Dent* case your Honor said that in order to  
11 determine whether or not the league had an obligation to  
12 disclose to the players and the scope of that obligation, it  
13 had to first determine what were the obligations to disclose of  
14 the clubs and of the players and of the doctors.

15 And then the Court went on to say that in order to  
16 determine the scope of the disclosure obligation of the clubs,  
17 the players and the doctors, one had to interpret the CBA.

18 So there is -- the difference that's suggested here is  
19 elusory. The same task, the same obligation, the same need for  
20 interpretation is present here. The fact that this is against  
21 the -- this case is against the clubs where you have to get  
22 into that interpretation question directly, as opposed to the  
23 league where there was this so-called buffer, is totally  
24 immaterial.

25 Now, if I may respond to what my colleague's -- my

1 colleague's point about the complaint. The complaint, as I  
2 noted before, the claims are for intentional misrepresentation  
3 and civil conspiracy and said and those arise from omissions  
4 and affirmative statements.

5 But that's precisely what the plaintiffs alleged in the  
6 *Dent* case. And in that regard I would invite your Honor's  
7 attention to Pages 20 and 21 of the *Dent* opinion, where the  
8 Court addressed the fraud-based claims. They are for fraud and  
9 fraudulent concealment regarding the league's purported  
10 concealment of the pain medication's side effects and risks.

11 It's precisely the same type allegation. Precisely the  
12 same allegation that's being made here, just with a different  
13 label.

14 **MR. CLOSIUS:** Your Honor, if I might make two points?

15 **THE COURT:** Wait. Wait a minute. Hang on. Let me  
16 just think about this for a minute.

17 So what is it then that -- what is in the CBA that would  
18 regulate this conduct?

19 **MR. LEVY:** Well, your Honor, the same provisions on  
20 which your Honor relied with respect to the CBA in the *Dent*  
21 case. And I can give you -- I can give you a number of  
22 instances.

23 I mean, your Honor said in the *Dent* case that in order to  
24 determine the scope of the -- of any disclosure obligation, and  
25 now I'll quote:

1            "It would be necessary to interpret the CBA  
2            provisions on the disclosure of medical information  
3            to determine whether plaintiffs reasonably relied on  
4            the alleged lack of proper disclosure by the NFL and,  
5            also, to resolve what duty the NFL owed to players.

6            In disclosing information about pain medication,  
7            interpretation of the CBAs would be required to  
8            determine the duty of care owed by the individual  
9            club's physicians and trainers in disclosing  
10           information about the pain medications."

11           It's precisely the same. And the provisions that -- the  
12           provisions that are invoked there include provisions requiring  
13           the clubs to retain doctors and trainers in the first instance,  
14           provisions imposing on club physicians -- not the clubs, but  
15           the physicians -- and obligation to advise the player in  
16           writing if the doctor believes that the player has a physical  
17           condition that adversely affects his performance or health and  
18           that could be aggravated by a further performance, as well as  
19           provisions requiring the players to make full disclosures and  
20           to receive treatment from the club physician while also giving  
21           the players the right to secure a second opinion, the right to  
22           rely on surgeons of his choice, copies of his medical records.

23           So there are a whole host of questions that need to be  
24           resolved in order to determine the obligations of the clubs, as  
25           well as the trainers, as well as the players.

1           **THE COURT:** You were going to respond?

2           **MR. CLOSIUS:** If I could clarify something?

3           The conduct at issue here is the same conduct at issue in  
4 *Dent* substantially. Defendants seem to think that's a horrible  
5 thing that we should somehow be embarrassed about. We're not,  
6 your Honor.

7           This is a global conspiracy. This involves the league.  
8 It involves the teams. It involves the doctors. It involves  
9 the trainers. It involves the drug companies.

10          Uncovering and dismantling this conspiracy without  
11 discovery is not easy. We're not under an obligation to sue  
12 every member of the conspiracy in one lawsuit. As we discover  
13 more information, we're allowed to bring in pieces of the  
14 conspiracy as we -- as we desire.

15          We're not interested in the doctors and trainers, your  
16 Honor. We're not interested in the henchmen. We're interested  
17 in the people who gave the order. We're interested in the  
18 people who profited to the tunes of billions of dollars. And  
19 as best we can see that, that's the clubs. And that's the  
20 lawsuit we're bringing.

21          I understand why they are desperate to say that this is  
22 the same case as *Dent*. The truth is, it's not. Even though a  
23 lot of the underlying conduct is similar.

24          Secondly, by changing the defendants toxicity clubs, we  
25 think we've clarified the line of responsibilities and duties,

1 as I alleged before.

2 I would note that two 2014 cases, *Green versus Pro*  
3 *Football, Inc.*, which is the Washington Redskins, and a  
4 different *Green versus the Arizona Cardinals*. Both against the  
5 clubs -- against the clubs. Both of them decided they were not  
6 preempted on essentially the same argument that the clubs are  
7 making today.

8 So the two most recent cases that have dealt with a club  
9 defendant have both --

10 **THE COURT:** I asked you if there were any other cases  
11 and you only gave me Judge Nelson.

12 **MR. CLOSIUS:** Your Honor, you said it was after the  
13 decision in *Dent*. Both of these decisions were done,  
14 unfortunately for us, before the *Dent* opinion.

15 **THE COURT:** Did I know about those decisions? I  
16 don't know if I -- I don't remember what I knew about two years  
17 ago, but if it's something new to -- give me the cites to those  
18 decisions. Do you have them now? Can you give them to me  
19 after the hearing?

20 **MR. CLOSIUS:** I can grab them --

21 **THE COURT:** No. I'm going to let you submit  
22 something in writing.

23 **MR. CLOSIUS:** Okay. But the District Court decision  
24 in the -- District Court of Maryland, where we originally  
25 brought the lawsuit, is dead on. It is involving illegal

1 conduct by the team, the Washington Redskins. It's a bounty  
2 program where they are trying to hurt people intentionally.  
3 And the judge said it's illegal conduct. It's modifying a  
4 common law battery claim, therefore, it can't be preempted.

5 Your Honor, the last point I'll make on this is, again, I  
6 think a critical one. The case are clear that merely listing  
7 12 CBA sections is not enough to preempt, even if you don't  
8 agree with the illegal nature of the conduct. There needs to  
9 be specific Collective Bargaining Agreement provisions that  
10 apply.

11 It also ignores the Supreme Court's idea in *Lingle* of  
12 parallelism. Let's take an easy example, your Honor. Where  
13 does the duty come from to provide doctors and trainers? The  
14 defendant says it comes from the Collective Bargaining  
15 Agreement. The truth is it comes from a long-established tort  
16 of providing a safe workplace.

17 The NFL was established in 1923. The first meaningful  
18 bargaining agreement is 1977. That's 54 years. During that  
19 entire period, they provided doctors and trainers. Why did  
20 they do that? Because they had a tort law duty to do it. They  
21 have always provided doctors and trainers, even when there was  
22 no Collective Bargaining Agreement in effect.

23 **THE COURT:** You mean, back in 1930 they had --

24 **MR. CLOSIUS:** They only started in 1923, your Honor.

25 **THE COURT:** In 1923 they had doctors on the teams?



1           **MR. CLOSIUS:** The first -- one of the owners of the  
2 team in Indianapolis was a doctor. He's in the Hall of Fame.  
3 He was the first team doctor in 1923. It's in the complaint.

4           **THE COURT:** You're saying every single team had a  
5 doctor?

6           **MR. CLOSIUS:** I cannot verify every single team. But  
7 the truth is, what we can verify for certain, is that the  
8 Society of NFL Physicians and the Society for NFL Trainers were  
9 both established in the early 1960's, which is before any  
10 bargaining agreement happened.

11           So we know for a fact that every team had trainers and  
12 every team had doctors in the early 60's and those people had  
13 been in the profession for decades.

14           But, again, just because there is a prior common law duty  
15 and then the Collective Bargaining Agreement mentions it,  
16 doesn't mean that the prior law common law duty simply goes  
17 away. As long as we are simply alleging the underlying common  
18 law duty and don't reference a Collective Bargaining Agreement,  
19 it shouldn't be preempted, your Honor, even if you don't agree  
20 with the illegal nature of the conduct.

21           **THE COURT:** All right. I'm going to let each of you  
22 say one last thing and -- but here is what I want you to do.  
23 By Tuesday tell me -- I'll give you more time if you really  
24 need it. Tuesday at noon you can file up to 10 pages that  
25 cover these four points and anything else you want to say, and

1 then by Friday at noon next week you can each have five pages  
2 to reply. And then it will be under submission.

3 Now, tell me if that schedule works for you.

4 **MR. LEVY:** Your Honor, I will not be back in  
5 Washington until Monday. Could we push it back 24 hours?

6 **THE COURT:** Sure, Wednesday. Why don't we do this?  
7 We'll push it back to Thursday at noon. And then the following  
8 Monday at noon for the replies.

9 **MR. LEVY:** Okay. Thank you, your Honor.

10 **THE COURT:** Is that okay with you?

11 **MR. CLOSIUS:** That's fine, your Honor.

12 **THE COURT:** All right. So each of you get to say one  
13 last thing. You get to go first.

14 **MR. LEVY:** Your Honor, there is no difference at all  
15 between these two cases. Your Honor decided issues of fraud  
16 and fraudulent concealment in the *Dent* case. The allegations  
17 here are the same allegations that were made in *Dent*.

18 The law is clear that in those circumstances when you need  
19 to allocate the responsibility and you need to allocate the  
20 duties among the doctors, the trainers, the clubs and the  
21 league, requires interpretation of the collective bargaining  
22 provisions that address the disclosure of the -- address the  
23 provision of medical care.

24 As your Honor said in the *Dent* case:

25 "The players union and the clubs have bargained

1 extensively over medical care for decades. Their  
2 Collective Bargaining Agreements have imposed  
3 numerous duties upon the clubs, the club doctors and  
4 the players themselves for the protection of players'  
5 health and safety."

6 And as your Honor further recognized:

7 "Those collectively bargained obligations include  
8 proper medical care with respect to the  
9 administration of drugs and pain killers," the  
10 subject of their claims here.

11 In order to determine where the obligations lie, the scope  
12 of the obligations and, even more importantly, the  
13 reasonableness of the players' reliance on what they were told  
14 by the doctors or not told by the doctors, told by the trainers  
15 and not told by the trainers, you have to look and interpret  
16 the provisions of the Collective Bargaining Agreement.

17 **THE COURT:** All right. Last word.

18 **MR. CLOSIUS:** Your Honor, when I talk to players, one  
19 of the hardest things they have to understand and comprehend is  
20 the nature of this claim; that, in fact, everybody around them  
21 in the National Football League didn't care that their  
22 long-term health was being destroyed by drugs to get them back  
23 on the field. That the coaches, the trainers, the doctors, the  
24 general managers, the owners and the league were willing to put  
25 their long-term health for profit.

1 We are suing the people who are responsible for that  
2 system, the NFL clubs, who profited to the tunes of billions  
3 and who harmed their players in the long term. These are all  
4 latent injuries.

5 This is their only forum, your Honor. If this -- these  
6 claims are preempted because you choose to shield illegal  
7 conduct, they have no remedy. They deserve to at least get the  
8 discovery and at least to be able to confirm the truths that  
9 are alleged in the complaint; that these clubs knowingly  
10 accepted illegal means to profit and to get wealthy.

11 We would beg your Honor to give them that chance and at  
12 least let us get the discovery and be able to give them the  
13 satisfaction of knowing that this was actually going on; that  
14 this illegal conspiracy was, in fact, going on and that their  
15 pain and their suffering were directly caused by it.

16 Thank you, your Honor.

17 **THE COURT:** All right. Please submit those briefs,  
18 but don't attach things. Just ten pages and five pages. Don't  
19 say: Okay, here is Exhibit A, B and C. That's no good. Just  
20 ten pages, double spaced. No footnotes. I hate to have to  
21 specify everything, but just stick to ten and five.

22 Thank you.

23 **MR. CLOSIUS:** Thank you.

24 **THE COURT:** You've briefed it extensively already.

25 All right. Thank you.

1           **MR. LEVY:** Your Honor?

2           **THE COURT:** Yes, sir.

3           **MR. LEVY:** We are scheduled to see you at 11:00  
4 o'clock for a case management conference.

5           **THE COURT:** I don't want to set a schedule for the  
6 case until I figure out what I'm going to do with this motion.  
7 So -- is that all right?

8           **MR. LEVY:** Yes.

9           **THE COURT:** Or do you want me -- I think it would be  
10 premature to set a schedule. So I may either bring you back or  
11 just propose one in writing if we -- if I keep the case alive  
12 in any respect, then I will probably just give you a proposed  
13 schedule and let you deal with it by mail.

14           **MR. LEVY:** Thank you.

15           **MR. CLOSIUS:** To be explicit, your Honor, we don't  
16 have to be here at 11:00 o'clock?

17           **THE COURT:** No. Go get back on the airplane and  
18 return to Maryland and Washington, and welcome back.

19           Where do you practice?

20           **MR. CLOSIUS:** In Baltimore, your Honor.

21           **THE COURT:** So maybe you'll be on the same airplane.  
22 Maybe.

23           **MR. CLOSIUS:** Thank you, your Honor.

24           **THE COURT:** You could play cards or something.

25           (Laughter.)

1           **THE COURT:** All right. Thank you.

2           **MR. LEVY:** Thank you, your Honor.

3           **THE COURT:** See you.

4           (Proceedings adjourned.)

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CERTIFICATE OF OFFICIAL REPORTER

I certify that the foregoing is a correct transcript from  
the record of proceedings in the above-entitled matter.

*Debra L. Pas*

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Debra L. Pas, CSR 11916, CRR, RMR, RPR

Tuesday, June 14, 2016